

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION**

TECHNICAL ANALYSIS

**Proposed Administrative Civil Liability
Contained in Complaint No. R9-2002-003**

**Promenade, Inc.
Pacific Beach Promenade
4150 Mission Boulevard
San Diego, California**

For

**Noncompliance with Order No. 96-41
NPDES No. CAG919002
General Waste Discharge Requirements
for**

**Groundwater Extraction and Similar Waste Discharges
from Construction and Remediation Projects
to**

**Surface Waters Within the San Diego Region
Except for San Diego Bay**

April 4, 2002

by

**Rebecca Stewart
Sanitary Engineering Associate
Compliance Assurance Unit**

1. INTRODUCTION

This report provides a summary of factual and analytical evidence supporting administrative assessment of civil liability in the amount of seventy eight thousand dollars (\$78,000) against Promenade, Inc., Pacific Beach Promenade Dewatering, located at 4150 Mission Boulevard, in the City of San Diego.

2. ALLEGATIONS

The following allegations against Promenade, Inc. Pacific Beach Promenade Dewatering are the basis for assessing administrative civil liability and also appear in Complaint No. R9-2002-003. Promenade, Inc. exceeded effluent limitations contained in Order No. 96-41. The Pacific Beach Promenade dewatering operation exceeded effluent limitations on twenty seven occasions between March 2000 and August 2001 for the following constituents: total suspended solids, cyanide, pH, copper, zinc, and chronic toxicity.

3. BACKGROUND

Water Code Section 13385(h)(1) requires the Regional Board to assess a mandatory penalty of three thousand dollars (\$3,000) for each serious violation in any six-month period. A serious violation is any waste discharge that exceeds the effluent limitations for a Group I pollutant by 40 percent or more or a Group II pollutant by 20 percent or more. Group I and Group II pollutants are identified in Appendix A to Section 123.45 of Title 40 of the Code of Federal Regulations.

Water Code Section 13385(i) requires the Regional Board to assess a mandatory penalty of three thousand dollars (\$3,000) for each violation, not counting the first three violations, if the discharger does any of the following four or more times in any six-month period:

- Exceeds a waste discharge requirement effluent limitation.
- Fails to file a report pursuant to Water Code Section 13260.
- Files an incomplete report pursuant to Water Code Section 13260.
- Exceeds a toxicity discharge limitation where the waste discharge requirements do not contain pollutant-specific effluent limitations for toxic pollutants.

Promenade, Inc. is regulated under Order No. 96-41, NPDES No. CAG919002, *General Waste Discharge Requirements for Groundwater Extraction Waste Discharges From Construction, Remediation, and Permanent Groundwater Extraction Projects to Surface Waters Within the San Diego Region Except for San Diego Bay*. Promenade, Inc. was authorized to discharge up to 1.5 million gallons per day of groundwater to Mission Bay from a permanent dewatering

operation. The groundwater discharge at the Pacific Beach Promenade has been continuously regulated under an NPDES permit since 1985.

4. DETERMINATION OF ADMINISTRATIVE CIVIL LIABILITY

4.1. Factors to be Considered When Determining Administrative Civil Liability

California Water Code Section 13385(e) requires the SDRWQCB to consider several factors when determining the amount of civil liability to impose. These factors include: "...the nature, circumstance, extent and gravity of the violation, and with respect to the violator, the ability to pay, and prior history of violation, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters that justice may require."

4.1.1. Nature, Circumstance, Extent, and Gravity of Violation

Between March 2000 and August 2001 Promenade, Inc. exceeded the instantaneous maximum, daily maximum, 30-day average, and/or 6-month median effluent limitations for total suspended solids, cyanide, pH, copper, zinc and chronic toxicity.

Effluent limitations contained in Order No. 96-41, specific violations of these limits, violation dates and supporting information are summarized in Table 1. Attachment No. 1 includes portions of the discharger's self-monitoring reports showing the violations addressed in Complaint No. R9-2002-003. The identified exceedances are violations of California Water Code Section 13385 (h) and (i) and are therefore subject to mandatory minimum penalties. Under California Water Code Section 13385(h) and (i), the amount of the mandatory minimum penalty that must be assessed is \$78,000.

Pacific Beach Promenade's dewatering discharges to Mission Bay. Beneficial uses for Mission Bay as defined by the Basin Plan are:

- (a) Industrial Process Supply
- (b) Contact Water Recreation
- (c) Non-contact Water Recreation
- (d) Commercial and Sport Fishing
- (e) Estuarine Habitat
- (f) Wildlife Habitat
- (g) Rare, Threatened, or Endangered Species
- (h) Marine Habitat
- (i) Migration of Aquatic Organisms

(j) Shellfish Harvesting

Mission Bay is listed on the State's list of "Impaired Water Bodies" [required by subdivision (d) of Clean Water Act Section 303, 33 USC 1313] for eutrophication, high coliform and lead impairments.

4.1.2. Degree of Culpability

The discharger, Promenade, Inc., discharged pollutants directly into Mission Bay from its permanent dewatering discharge. Having done so, in concentrations that violation Order No. 96-41, the discharger must bear the full responsibility and consequences of these actions.

4.1.3. Prior History of Violation

In addition to the violations addressed in Complaint No. R9-2002-003, effluent violations for total suspended solids have been recorded in self monitoring reports submitted for the Pacific Beach Promenade Dewatering operation in 1997, 1998 and 1999. Total phosphorus violations were also recorded in all four quarters of 1999. No formal enforcement action was taken against the violations in 1997, 1998 and 1999.

4.1.4. Economic Savings

It is assumed that the value of the mandatory minimum penalty is sufficient to recover any economic benefit derived from noncompliance with discharge effluent limitations contained in Order No. 96-41.

4.1.5. Ability to Pay and Continue in Business

At this time, the SDRWQCB has no information that Promenade, Inc. is unable to pay the proposed mandatory minimum penalties or how payment of the proposed penalties would affect their ability to remain in business.

4.1.6. Other Matters as Justice May Require

Over the course of dealing with Promenade, Inc. regarding this matter, the SDRWQCB has invested 50 hours in enforcement document preparation and meeting participation. At an average rate of \$80 per hour, the total cost to the SDRWQCB is \$4,000.

4.2. Maximum Civil Liability Amount

Pursuant to California Water code Section 13385 the maximum civil liability that the Regional Board may assess is (a) ten thousand dollars (\$10,000) per day of violation; and (b) ten dollars (\$10) per gallon discharged, over one thousand gallons discharged, that was not cleaned up. California Water Code Section 13385(e) requires that, when pursuing civil liability under California Water Code Section 13385, "At a minimum, liability shall be assessed at a level that recovers the economic benefit, if any derived from the acts that constitute the violation."

4.2.1. Exceedance of Effluent Limitations Contained in Order No. 96-41

Twenty-six daily maximum effluent limitations contained in Order No. 96-41 were exceeded over a seventeen-month period (March 31, 2000 through August 23, 2001). Therefore the maximum civil liability, which could be imposed by the SDRWQCB for this measure of liability is two hundred and sixty thousand dollars (\$260,000).

The volume discharged during the nine days that discharges of pollutants exceeded effluent limitations contained in Order No. 96-41 (March 31, 2000, June 23, 2000, September 28, 2000, October 30, 2000, December 29, 2000, February 27, 2001, June 18, 2001, June 21, 2001, and August 23, 2001) is estimated to be 714,200 gallons. Therefore the maximum civil liability which could be imposed by the SDRWQCB for this measure of liability is seven million one hundred forty two thousand dollars (\$7,142,000).

The total maximum liability that could be assessed for the violations addressed in Complaint No. R9-2002-003 is seven million, four hundred and two thousand dollars (\$7,402,000).

4.3. Proposed Civil Liability Per Violation

The proposed amount of civil liability attributed to each violation was based on the mandatory minimum penalty required for these violations. The proposed civil liability is seventy-five thousand dollars (\$75,000).

